



1616 P Street, NW
Suite 300
Washington, DC 20036
T +202.683.2500
F +202.683.2501
foodandwaterwatch.org

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FREEDOM OF INFORMATION ACT REQUEST

Submitted via <https://www.foiaonline.gov>

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Re: Records related to pending FIFRA petition

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW). This request seeks specific documents regarding the Environmental Protection Agency's (EPA) consideration of a citizens' petition to regulate systemic pesticide-coated seeds under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* FWW has a strong interest in information related to the federal government's activities to consider more protective pesticide regulation.

FWW is a national, non-profit, membership organization dedicated to healthy food and clean water for all. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to stand up to corporations that put profits before people, and advocate for a democracy that improves people's lives and protects our environment. Industrial agriculture, including harms to health and the environment from pesticide use and other industrial agricultural practices, is among FWW's priority issues, and FWW is engaged in advocacy work to protect pollinators and worker and consumer health from pesticides and other agribusiness pollution.

Records Requested

Pursuant to FOIA, FWW requests copies of any and all documents, records and communications of any kind, including but not limited to e-mails and meeting notes, reflecting communications between EPA and representatives of agricultural trade organizations, agricultural supply companies such as seed suppliers, or pesticide producers, (hereinafter records) relating to the pending Petition to Regulate Coated Seeds Under FIFRA, Docket ID EPA-HQ-OPP-2018-0805-FRL-9987-54 ("the Petition"), from April 26, 2017 to the date of final production. This request does not include any public comments or other records available in EPA's petition docket.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. This request does not include any records that EPA currently maintains on its website.

To save resources and mailing expense, we request electronic copies of these documents whenever available. In addition, rather than waiting until all requested records have been assembled for the time period requested, FWW asks that you disclose responsive records as they become available to you.

Claims of Exemption from Disclosure

If you regard any requested records or portions of records as exempt from disclosure under FOIA, FWW asks that you please exercise your discretion to disclose them nonetheless. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial.

In accordance with the minimum requirements of your due process, this information should include:

- 1) Basic factual information, including the author, origin, date, length, and address of withheld records or portions of records; and
- 2) Explanations and justifications for denial, including identification of the exemption(s) applicable to the withheld information and explanations of how each exemption applies to each withheld record or portion of a record.

Fee Waiver Request

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as FWW, access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, FWW satisfies the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l).

Requirement 1: Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government

Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government

FWW seeks EPA records related to a pesticide petition pending before EPA. This request relates to these EPA operations and activities, the information requested clearly “concerns the operations and activities of the federal government,” and therefore satisfies the first fee waiver criterion. 40 C.F.R. § 2.107(l)(2)(i).

Factor 2: The disclosure is “likely to contribute” to understanding of federal government operations or activities

Disclosure is “likely to contribute” to an understanding of EPA’s operations or activities, 40 C.F.R. § 2.107(l)(2)(ii), because it will shed light on what activities EPA has undertaken related to a petition that has been pending for several years, and for which EPA has accepted public comment. The records requested will be “meaningfully informative,” *id.*, of EPA’s activities because information about EPA’s communications with industry regarding the Petition is not “already . . . in the public domain, in either a duplicative or a substantially identical form.” *Id.* Aside from any public comments in EPA’s Docket that are outside the scope of this request, information about EPA’s engagement with pesticide industry interests related to the Petition is not currently publicly available. Such information will allow FWW and the public to better understand the extent of EPA’s actions to carry out its duties under FIFRA and other federal laws. The requested information is critical to gaining an understanding of these EPA operations and activities.

Factor 3: The disclosure will contribute to “public understanding” of EPA’s operations and activities

The disclosure will contribute to “public understanding” of the subject of the request because it will contribute to the understanding of a “reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii). *See also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”).

FWW will effectively disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons, and will do so in ways that effectively contribute to the public’s understanding. FWW is a membership organization with a staff of over 100, including researchers, organizers, attorneys, and communications professionals. FWW has scientific and legal expertise and our staff regularly analyze data, including FOIA records, and use this information to write, speak, and advocate to the media, our membership, and the public on environmental issues. FWW

frequently uses FOIA records and other public data to draft and issue policy-based reports related to industrial agriculture, water pollution, and other issues of public interest. *See* <http://www.foodandwaterwatch.org/library>. FWW has a long history of analyzing federal government data and making it available to the public. FWW is therefore prepared to analyze the information and present it to the public in a way that will most effectively increase public understanding of the subject.

FWW is also well-positioned to effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels, including: traditional media outlets; FWW's website, Facebook page, other social media outlets, and newsletter; press releases; blog posts on websites such as the Huffington Post; presentations at community meetings and conferences, environmental attorneys and advocates, and other interested members of the public; and emails to some or all of FWW's millions of supporters. FWW's work on industrial agriculture and its pollution and other harmful impacts, as well as its work to highlight EPA's inadequate regulation of industrial agricultural pollution, has garnered significant media attention, including coverage in Politico, Inside EPA, Bloomberg, Greenwire, and numerous state and local outlets across the country, demonstrating FWW's ability to reach interested members of the public with the requested information.

FWW will also make the information available to national, regional, state, and local organizations with members and supporters interested in the subject. Specifically, FWW will share the responsive records with the organizations that submitted the Petition, and ensure that they are able to similarly disseminate the information to a broad audience of interested members of the public. Due to these organizations' large collective membership of citizens interested in this subject, our demonstrated ability to effectively analyze EPA records and disseminate information to the public directly and through the media, and our relationships with other organizations that can reach a broad audience of persons interested in the information in the requested records, FWW is uniquely able to contribute to "public understanding" and meet this fee waiver criterion.

Factor 4: The disclosure is likely to contribute "significantly" to public understanding of EPA activities

FWW also meets the fourth fee waiver criterion, because the public's understanding of EPA's operations or activities related to systemic pesticides "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because FWW, our coalition partners, and interested members of the public know little about EPA's consideration of the Petition and any relevant communications EPA has had with industry groups and companies related to the Petition, the requested disclosures will undoubtedly increase public understanding of these subjects by a significant extent. The Petition has been pending for several years, and despite having opened a docket and solicited public comment, EPA has yet to respond or indicate that it is preparing to respond.

None of the records requested are currently available on EPA’s website, elsewhere on the Internet, or have been previously published by EPA. As a result, interested members of the public are currently largely in the dark regarding EPA’s consideration of the Petition and what role, if any, the pesticide and seed industries are playing in EPA’s consideration. The requested records have significant informative value.

As discussed above, FWW has demonstrated its ability to significantly increase public understanding of industrial agricultural issues, including through the use of federal FOIA records, in the past, and given the current lack of public access to the information sought in this request, will certainly do so again in this case. FWW is experienced at analyzing, synthesizing, and distilling voluminous and complex federal agency records and making them available and easily understandable to interested members of the public. In so doing, FWW is able to ensure that the increase in public understanding of EPA’s consideration of and industry engagement regarding the Petition will be significant.

Requirement 2: Disclosure is not primarily in the commercial interest of FWW

Factor 1: FWW has no commercial interest in obtaining the information

The second element of the fee waiver analysis addresses the requester’s “commercial interest” in the information. Two factors must be addressed when determining whether the information requested is “primarily in the commercial interest of the requester[s].” 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as a nonprofit organization, FWW does not have any commercial, trade, or profit interest in the material requested. FWW will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

Factor 2: Disclosure is not “primarily in the commercial interest of the requester[s]”

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(l)(3)(ii). Clearly, there is great public interest in the release of the materials sought because they will allow the public to learn about EPA’s consideration of a systemic pesticide petition that has been pending, unanswered, for several years. Thus, even if FWW did have some “commercial” interest in the documents requested, a complete fee waiver would still be required because FWW’s “primary” interest in the material is to inform the public about the operations and activities of the government. Therefore, this is a situation in which the “public interest is greater in magnitude than that of any identified commercial interest” of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the “disclosure of the information . . . is not primarily in the commercial interest of” FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA's activities and operations, and will not serve any commercial interest on the part of FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, FWW will not be responsible for those costs. FWW reserves the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (202) 683-2457 or theinzen@fwwatch.org. Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tarah Heizen".

Tarah Heizen
Senior Staff Attorney
Food & Water Watch
1616 P St. NW, Suite 300
Washington, DC 20036
theinzen@fwwatch.org
(202) 683-2457